

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LEONARDO RUBIO,

Petitioner,

v.

CIV 03-504 MCA/KBM

TIM LeMASTER, Warden, et al.

Respondents.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

This matter is before the court on a petition that this court has characterized as brought under 28 U.S.C. § 2254, *Doc. 1*, and Respondents' Answer and motion to dismiss the petition as unexhausted., *Docs, 9, 10*. There is no need to await a response because the petition readily acknowledges that no direct appeal or post-conviction relief has been pursued. Respondents' motion explains to Petitioner why he is entitled to pursue a delayed direct appeal and that he may also pursue post-conviction relief. Respondents explain the general procedures and provide him with the address and telephone number of the New Mexico Public Defender.

For the reasons set forth in Respondents' motion, the § 2254 proceeding cannot go forward in this court until Petitioner exhausts his state remedies. Accordingly, the motion should be granted. I also note, however, that although Petitioner filed on a form § 2241 petition, this court characterized the matter as challenging his state court conviction under § 2254. If Petitioner is actually attempting to challenge a deportation order issued by the *federal government*, that is the Immigration and Naturalization Service, he needs to clarify that fact in

any objections he may have to this recommended disposition.

Wherefore,

IT IS HEREBY RECOMMENDED that Respondents' motion (*Doc. 10*) be GRANTED and this § 2254 petition be dismissed without prejudice for failure to exhaust.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 10 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the ten-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**


UNITED STATES MAGISTRATE JUDGE